

**THE LEGAL IMPEDIMENTS TO DEVELOPMENT IN
NORTHERN KENYA**

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THE LEGAL IMPEDIMENTS TO DEVELOPMENT IN NORTHERN KENYA

HISTORICAL BACKGROUND

Northern Kenya comprise of the Northern frontier Districts of Wajir, Mandera, Ijara, Garissa, Isiolo, Moyale and Marsabit. Most of the inhabitants of this region were ethnic Somalis, Borana and others allied to them. They had a lot in common; (in terms of religion, language, customs, Nomadic way of life, etc) with the other Somali regions under Italian, British, and French occupation than with the rest of other Kenyans. This fact was apparent to the British colonial officials in East Africa much earlier when in 1902, the then Commissioner of the East Africa protectorate, Charles Elliot stated that,

"if it were possible to detach the districts inhabited by the Somalis it would be an excellent thing to form them into a separate government". This did not happen and after the completion of the partition of Africa by the Colonial Powers, N.F.D became part of Kenya while the rest of the areas inhabited by the Somalis came under the French (Djibouti), Italy (Southern Somalia), British (Northern Somaliland) and Ogadenia now under Ethiopia. Ethiopia, under Menelik, took an active role in the partition of Africa. He wrote to the European Colonial Powers stating that, **"If powers at distant come forward to partition Africa between themselves, I don't intend to be an indifferent Spectator."** He was then given large areas of Somali inhabited areas which today form Zone 5 of Ethiopia.

The colonial government in Kenya, in an effort to control the movement of Northern Kenya into the hinterland of East Africa and of their integration with others in Kenya, enacted several legislations specifically targeting N.F.D. The first was the Outlying District Ordinance 1902 which applied exclusively to N.F.D. The effect of the Ordinance was to declare N.F.D. a closed area. Movement in and out of the area was restricted and only under a special pass. The second was the Special Districts (Administration) Ordinance, 1934, which together with the Stock Theft and Produce Ordinance, 1933, gave the colonial administrators in the region extensive powers of arrest, restraint, detention and seizure of properties of **"hostile tribes"**. The definition of what constitutes a hostile tribe was left to the Provincial Administration to determine.

These ordinances not only applied to N.F.D. but also to Tana River, Lamu, Kajiado and Samburu districts. Further the Stock Theft and Produce Ordinance legalized collective punishment of tribes and clans for the offence of their member once that tribe was declared "a hostile tribe" by the Provincial Commissioner. The long title of the said ordinance stated thus:- **"An ordinance to provide for the recovery of fines imposed on Africans (including Somalis) for the theft of stock or produce by levy on the property of the offender or his family, sub-tribe or tribe....."** The meaning of what constitutes "stock" was as defined in Section 278 of the Penal Code. Under this Section stock is defined as to include any of the following that is to say; horse, mare, gelding,

ass, mule, camel, ostrich, bull, cow, ox, ram, ewe, whether goat or pig or the young thereof.

The net effect of these early colonial legislation was to turn N.F.D. into a closed zone, which had no contact or relation with the other parts of Kenya. Indeed, the other Kenyans did not know much about N.F.D. This situation continued even after independence and is best captured by the statement of the American writer, Negley Farson, that, "**there is one half of Kenya about which the other half knows nothing about and seems to care even less**".

INDEPENDENCE OF KENYA AND N.F.D

By the time political activities were legalized in Kenya in 1960, the people of N.F.D, with the active moral, diplomatic and material support of the newly independent Republic of Somalia, formed the Northern Province Peoples Progressive Party (N.P.P.P.P.) whose main agenda was the secession of N.F.D. and re-union with Somalia. Somalia offered the Leadership of N.P.P.P.P. a base in Mogadishu and offered diplomatic support for their cause by putting it in the international scene under the right to self-determination Principle.

Somalia became Independent on 1st July, 1960 and it was made up of the former British Somaliland Protectorate and Italian Somaliland. One of the objects of the new Somali government as stated in the Independence Constitution (article 6(4) was, "**the union of Somali territories by legal and peaceful means**". The Provisions for citizenship under the Somalia Constitution was as broad and liberal as to include all ethnic Somalis wherever they were. Independent Somalia's ambition was to achieve the union of all Somali territories not yet independent in Kenya, Ethiopia and in Djibouti to form Greater Somalia. It's first President, Dr. Abdi Rashid Ali Sharmaarke, justified this position in his speech to the U.N., when he said, "**Our misfortunes do not start from unproductiveness of the soil, nor from lack of any material wealth. These limitations on our material well being were accepted and compensated for by our forefathers from whom we inherited among other things cultural prosperity of inestimable value. Our misfortune is that our neighboring countries with whom like**

the rest of Africa we seek to promote constructive and harmonious relationships are not our neighbors. Our neighbors are our Somali Kinsmen whose "citizenship" has been falsified by indiscriminate boundary arrangements. How can we regard our own brothers as foreigners"?

During the start of the Lancaster House talks on the Independence Constitution for Kenya, a delegation of leaders from N.F.D. met with the then British Secretary for colonial Affairs in London stating the N.F.D. position of secession from Kenya to Somalia. Abdi Rashid Khalif who represented the region in the talks stated that he was neither a member of KANU nor of KADU but a secessionist. At the Kenya Constitutional Conference of 1962, the Secretary of state for colonies proposed to arrange for an Independent Commission to be appointed to investigate public opinion in the N.F.D. regarding its future. This Commission, called the N.F.D. Commission, consisted of two members, G.C.M. Onyiuke and Major General M.P. Bogert. Their terms of reference were, **"To ascertain and report on public opinion in the N.F.D. (comprising of Garissa, Wajir, Mandera, Isiolo, Marsabit and Moyale) regarding arrangements to be made for the future of the area in the light of the likely course of Constitutional development in Kenya"**. They were also to direct inquiries towards ascertaining the people's opinion in relation to the period of internal self-governance in Kenya and the period after Independence. The Commission visited every district in the N.F.D. It heard oral submissions from 134 delegations and received 106 written submissions. It also held meetings in Nairobi with the leaders of other political parties. There were two pre-dominant opinions then - Pro-Kenya and Pro-Somalia. The division of the opinion was influenced very much by the tribe and religion of the communities. Majority of the people of N.F.D. of the Somali and non-Somali Muslims were in favor of secession to Somalia while the others supported being in Kenya.

The British Government was unwilling to abide by the result of the Commission on the grounds that it was not prepared to take a unilateral decision on the future of the territory so close to the date of Kenya's Independence. However, the Regional Boundaries Commission set up by the British Government in 1962 recommended that the predominantly Somali occupied Districts of Garissa, Wajir and Mandera be constituted into

the 7th region and the North Eastern Province was then born. The Colonial Secretary, while announcing the creation of the Province in March 1963, made the following statement: - **"We are not so foolish as to imagine that the creation of a seventh region will be hailed as providing satisfaction, but I do trust that it will be received by the Somali as an expression of sincere goodwill, not only from the British, but also from the Kenya Government. We, not only the British Government, but both Parties in Kenya, understand the desire of Somali people to express their own identities, particularly when you get people of one race living in a country with people of another. But Kenya is a country which depends for its future on being able to recognize people of different races and prove it is capable of providing a home where people of different races can live honorably and amicably"** (The Times, 9th March, 1963). This was seen as a betrayal of the wishes of the people of N.F.D. in general and N.E.P in particular. Consequently they boycotted the elections of 1963 and the Leaders of N.P.P.P.P. started what came to be known as the **"shifta war"**. Somalia on its part broke off diplomatic relations with Britain in protest and started its overt and covert support for the N.F.D. secessionists. The Government of Kenya led by Mzee Jomo Kenyatta was firm on its stand that it will not cede an inch of Kenya's territory. He is reported to have said about those fighting for secession - **"Let them pack their camels and go to Somalia"**. A fortnight after Independence, the Government declared a state of emergency over the N.F.D. following increased attacks on government officers and institutions. In an address to the Parliament, the Prime Minister of Kenya, Jomo Kenyatta, explained the government's action to declare the state of emergency when he said, **"Our action declaring a state of emergency is intended to handle the source of the trouble by providing the security forces with the powers they need to deprive the shifta of the element of surprise attack. The government's action is purely defensive and we have taken emergency powers under the extreme provocation of violence"**. This state of emergency lasted for close to 30 years leaving behind a trail of death, destruction violations of human rights, marginalization and underdevelopment.

AMENDMENTS TO INDEPENDENCE CONSTITUTION AND EMERGENCY LAWS IN N.F.D.

Kenya became Independent on 12th December, 1963. Section 29 of the Independence Constitution provided for the procedure to be followed in the event of a declaration of a state of emergency. However, Section 19 of the Kenya Independence order in Council (Kenya subsidiary legislation, 1963) provided that the Governor General, **"may, by regulations which shall be published in the Kenya Gazette, make such provision as appears to him to be necessary or expedient for the purpose of ensuring effective government or in relation to the North Eastern Region and without prejudice to the generality of that power, he may by such regulation make such temporary adaptations, modifications or qualifications or exceptions to the Provisions of the Constitution or of any other Law as appear to him to be necessary"**.

The Powers granted in relation to N.E.P. were complimenting the already existing draconian legislations that applied to the region e.g. the Preservation of Public Security Act, the Outlying Districts Act, the Special District (Administration) Act, the Stock and Produce Theft Act, etc. When Kenya became a Republic in 1964, the powers enjoyed by the Governor - General under Section 19 of the Independence Constitution, were transferred to the President and this became Section 127 of the Republican Constitution giving the President the Power to rule N.E.P. by decree. There were several other amendments to the Independence Constitution since then. However, three (3) particular amendments affected N.E.P. and N.F.D very much. The third amendment vide Act No.14 of 1965 altered parliamentary majority required for approval of a declaration of a state of emergency from 65% to a simple majority. It also extended the period after which a parliamentary resolution must be sought from 7 to 21 days. Declaration of the state of emergency was made valid for 3 months instead of 2. The Fourth amendment vide Act No. 16 of 1966 extended the President's Power to rule N.E.P by decree to Marsabit, Isiolo, Tana River and Lamu Districts. The regulations were published under the Preservation of Public Security Act, Chapter 57, Laws of Kenya as N.E. Province and contiguous Districts Regulations, 1966. The sixth amendment vide Act No.18 of 1966

had the effect of enormously enlarging the government's emergency powers. It completely removed existing legislation relating to parliamentary control over emergency legislation and the Law relating to Public order. Existing Constitutional Provisions were repealed and replaced by one which gave the President a blank cheque power, **"at any time by order in the Kenya Gazette to bring into operation generally or in any part of Kenya, part III of the preservation of Public Security Act or any part thereof."**

The application of emergency Laws first in North Eastern Province and later in 1966 throughout the Northern Frontier Districts meant that in effect Kenya had two separate legal regimes - one applied exclusively to N.F.D. and one for the rest of Kenya. In addition to the already existing Laws affecting N.F.D specifically such as the Outlying Districts Act, the Special Districts (Administration) Act, the Stock Theft and Produce Act, the detailed Provisions of the emergency Law was contained in the North Eastern Province and Contiguous Districts Regulations, 1966 made under the Preservation of Public Security Act, Chapter 57, Laws of Kenya pursuant to the Provisions of Section 127 of the Constitution. The Regulations formed the basis for the derogation of human rights and explicitly endorsed instances in which the fundamental human rights of the person could be violated. In the process, the government arrogated to itself in the region powers that could only apply to the rest of the country when Kenya was at war. The Northern region was thus technically a war zone and virtually became a Police state. The Regulations created certain offences that were punishable without the due process of the Law. It also created **"prohibited** "and **"prescribed"** zones in the region. The Regulations defined a **"prescribed"** area to mean the area comprising the North Eastern Province and the Isiolo, Marsabit, Tana River and Lamu districts and a **"prohibited zone"** as the aggregate of the areas within the prescribed area. In

These areas the offence of possession of firearm, consorting or harboring one with a firearm was punishable by death. The offence of harboring anyone who may act in a manner prejudicial to the preservation of public security was punishable by life imprisonment. Even the owning, operating or use of boats or any other means of transport on Tana River was made a crime liable to imprisonment. Entry into the region

by members other than Civil Servants and members of the Security Forces was prohibited. Members of the Armed forces were empowered to carry out the functions of a Police Officer with wide powers of search, arrest, restriction and detention of persons in the region. Members of the Provincial administration and the security forces were given power to preside over "**judicial trials**". District administrators were at times sitting as "**Magistrates**" in Courts. The regulations also suspended the application of Sections 386 and 387 of the Criminal Procedure Code (which requires the holding of an inquest on the death of persons in Police custody or under suspicious circumstances) and instead stated that the Provisions will not apply in the case of persons dying or found dead in the "**Prohibited**" zone.

The Constitutional and legislative framework for the application of emergency Laws in the northern region can be said to have been completed in 1970 with the passing of the Indemnity Act, Chapter 44 of the Laws of Kenya. This Act, which came into force on 5th June 1970, was meant to indemnify government agents and members of the security forces working in the region against any claims on account of any loss or damage occasioned by their actions. The objective of the Act is clear in the long title of the Act. It states that it is an, "**Act of Parliament to restrict the taking of legal proceedings in respect of certain Acts and matters done in certain areas between the 25th December 1963 and 1st December 1967....**" Section 3 of the Act states that, "**No proceeding or claim to compensation or injury shall be instituted or entertained by any Court or by any authority or tribunal established by or under any Law for or on account of or in respect of Act, matter or thing done within or in respect of the prescribed area, after the 25th December 1963 and before 1st December 1967... If it was done in good faith or done in execution of duty in the Public interest by a Public Officer or member of the armed forces.....**". Section 2 of the Act defines the prescribed area as to mean the N.E.P. and Isiolo, Marsabit, Tana River and Lamu Districts. It is instructive to note that a lot of human rights violations occurred in the N.F.D. after 1967 and those responsible for those violations cannot claim indemnity under this Act.

EFFECTS OF EMERGENCY LAWS IN N.F.D.

The application of emergency Laws in the N.F.D. have had serious consequences for the people and the region. The effects of these Laws can be grouped into three (3) distinct categories, namely:-

1. Gross Violations of fundamental human rights.
2. Discrimination of the people of the region.
3. Marginalization and underdevelopment of the people and the region.

1. HUMAN RIGHTS VIOLATIONS

Among the plethora of grievances, which the people of the region have raised is the one directed against the operations of the security forces. Members of the security forces, including but not limited to the army, Police, the paramilitary G.S.U. and the anti-shifta force, have been accused of committing gross violations of human rights in the course of their duties, including instances of genocidal killings, mass murders and rape, extra-judicial killings, arbitrary arrests and detention of persons and communities and illegal confiscation and theft of properties. The following cases and incidents illustrate the foregoing:-

1. Bulla Kartasi Estate Massacre in Garissa in November 1980. This was the first well-documented massacre that occurred in Northern Kenya and was blamed on the members of Kenya Army. Following the killing, in an ambush, of six (6) government officials in Garissa town by one bandit known as Abdi Madobe, the security forces, in retaliation burnt the whole of Bulla Kartasi Estate in Garissa town killing people, raping women and herded the town's residents to a mini-concentration camp at Garissa Primary School play ground where they kept them for 3 days without food or water. Human rights organizations' estimates put the dead at over 3000 with an equal number unaccounted for.
1. The Wagalla Massacre in Wajir in February 1984. This was the second documented incident this time blamed on the General Service Unit (GSU). In February 1984, the security forces launched an operation in Wajir targeting the Degodia sub-clan of the Somali. Most of those rounded up in the swoop were summarily executed after days of incarceration at the Wagalla airstrip. Close to 5,000 people are said to have lost their lives during this incident.

1. Other instances of extra-judicial killings, and collective punishment of Communities include those in Malka-mari, Garse, Derakali, Dandu and Takaba areas of Mandera District.

2. DISCRIMINATION

Kenyan Somalis in general and those from N.E.P and indeed N.F.D, complain of discriminatory Laws, regulations, practice and procedures that apply to them only and not to the other Kenyans. This is especially acute in the area of citizenship and immigration Laws i.e. in the issuance of Birth Certificates, Identity Card and Passports. Their complaints have centered on the fact that they have to produce more documents and undergo additional scrutiny and procedure to acquire these documents which is not the case with other Kenyans.

The screening exercise of the Kenyan Somalis and their issuance with a Pink Card by the Government in November 1989 is also cited as a clear case of discrimination of the people of N.E.P. and N.F.D. The justification for the screening of the Kenyan Somalis was contained in a government statement which stated thus; **“The Government is to register all Kenyan Somalis and expel those found to have sympathy with Somalia. The Government cannot tolerate citizens who pretend to be patriotic to Kenya while they involve themselves in anti-Kenya activities. The Government has therefore found it necessary to register Kenyans of Somali ethnic group to make them easily identifiable by our security forces.”** The Provisions of the Registration of Persons Act, Chapter 107, Laws of Kenya, was used to implement the screening exercise. The Principal Registrar of Persons then issued a notice in the Kenya Gazette being legal Notice No.5320 of 10th November, 1989 which stated as follow:- **"In accordance with Section 8 of the Registration of Persons Act, the Principal Registrar requires all persons of the Somali ethnic Community resident in Kenya who are of eighteen (18) years and above to attend before registration officers at the centers specified in the second column of the schedule and furnish such documentary or other evidence of the truth of their registration between 13th November, 1989 and 4th December, 1989".**The screening exercise, which was in effect a mass verification exercise, was carried out through the use of vetting committees made of some selected elders and members of the Provincial Administration and Civil Service. All those who appeared

before the committee were basically required to show cause why their previous registration should not be cancelled. They were under a burden to prove their citizenship or their right to claim such. Those who satisfied the committee were issued with a pink registration card that bore their names, family, sub-clan, clan and tribe. Those who failed to satisfy the committee were either denied registration or had it cancelled if they had one before. They were thus effectively declared non-citizens and indeed stateless. Those affected were deported to Somalia while others opted to settle elsewhere in East Africa.

The screening exercise of the Kenyan Somalis and the attendant requirement of the production of their screening card in addition to their Identity Card as proof of their citizenship was seen as a discriminatory exercise against them and a violation of their fundamental rights to protection from discrimination as enshrined in Section 82 of the Constitution of Kenya which states that no Law shall make any Provision that is discriminatory either of itself or in its effect and that no person shall be treated in a discriminatory manner by a person acting by virtue of any written Law or in the performance of the functions of a Public office or a Public authority. The legality of the exercise was also questioned by many legal experts who felt that since the process of acquisition of Kenyan citizenship was provided for under the Constitution the Principal Registrar had no power to determine the citizenship status of a person since his mandate under the Registration of Persons Act was to register Kenya citizens of 18 years and issue them with an Identity Card but not to confer citizenship or deprive one of the same.

1. MARGINALIZATION AND UNDERDEVELOPMENT

One of the most visible legacies of the emergency Law period in the region is the state of underdevelopment in all aspects of life. The government's energies and resources were largely directed towards security and the maintenance of Law and Order. Its policy has been described as one of containment and not engagement. No constructive or meaningful development ever took place during this period. Indeed, over 80% of the region's budget was always spent on security leaving nothing for development. The net result is that the region is today the most underdeveloped and marginalized in Kenya. There are very few institutions of higher learning in the region. At Independence, there were only 2 Primary Schools in the whole of N.F.D. - one in Wajir and another in Isiolo.

The level of illiteracy in the area is over 80% while over 85% of the people live below the poverty line (which is approx. USD.1 per day by U.N. standards). There are no major health facilities in the area. The infrastructure of the region is deplorable. While the region covers over 130,000 sq. kms, it has only 6 kms of tarmac road. Education standards in the region is poor due to the lack of adequate facilities.

The performance of the students from the region in the National Examinations is consistent - the poorest results and lowest marks. The whole of N.F.D. sends to the Public Universities a fraction of what 1 school in Nairobi sends. Suffice to state that the region's cry for affirmative action and a Marshall plan for development is not without merit. The affirmative action required is mostly in the Education Sector and in the Public Service i.e. lower entry points for admission to Public Universities and middle level colleges, recruitment in the Public Service and disciplined forces, etc. The Marshall plan for development entails quantitative and qualitative increase in educational and health institutions, the road network, tax incentives for investors in the region, etc.

The state of underdevelopment is often cited as evidence of marginalization. The lack of government support to develop the market for the livestock industry, which is the main economic activity of the region, and the location of the Kenya Meat Commission at Athi River, far away from the N.F.D, is cited as marginalization of the people and the region. Government Policy of declaring that Agriculture was the backbone of the Kenyan economy which excluded the livestock sector in the scheme of things was the key to marginalization. No effort was made to harness the potentials in the livestock sector. There are no marketing or development board or research institutes for the livestock sector unlike in the other sectors of the Kenyan economy e.g. Coffee Board of Kenya, KTDA, Pyrethrum Board, NCPB, N.I.B., K.T.B., K.A.R.I., K.E.F.R.I., etc. Had the livestock sector been fully developed, the fortunes of the region would have been improved quite significantly. Botswana and Somaliland are often cited as good examples of countries that earn a lot from the livestock sector. The statutory definition of the boundary of Garissa District to exclude the River Tana from its territory (the "**3-mile rule**") is also said to manifest the marginalization that remained from the emergency period. Government control on the movement for sale of livestock from the region to

other parts of Kenya and the lack of good communication network such as tarmac roads for the border towns in the N.F.D such as Garissa and Mandera in N.E.P. and Moyale in Eastern Province which form the border towns for Kenya with Somalia and Ethiopia respectively as compared to the development of the road networks of other border towns such as Namanga and Taveta for Tanzania, Busia and Malaba for Uganda and Lodwar for the Sudan, has similarly been cited as evidence of Malignant marginalization. So too is the failure by government planners to group the Kenyan Somalis as one tribe like the others in Kenya instead of sub-dividing them into sub-clans and others during the National Population Census.

CONSTITUTIONAL REFORM, MULTI-PARTY POLITICS & REPEAL OF EMERGENCY LAWS

The start of the clamour for Constitutional reform in Kenya in 1990's which led to the repeal of Section 2A of the Constitution, the introduction of Multi-Party politics in Kenya and the Inter-Parties Parliamentary Group (IPP G) talks that produced the minimum reforms to the Constitution, also saw the repeal of the emergency Laws affecting N.F.D in general and N.E.P in particular. Section 127 of the Constitution, which laid the foundation for the state of emergency, was repealed on the 29th November 1991. Similarly the North Eastern Province and contiguous Districts Regulations, 1966 made under the Preservation of Public Security Act, was also repealed in 1991. Later the Outlying District Act and the Special Districts (Administration) Act were also repealed in 1997 under the Statute Law (Repealed and Miscellaneous) Amendment Act, 1997. The repeal of the above Laws were a big step forward in the restoration to the people of N.F.D of their fundamental rights and freedoms as guaranteed in Chapter 5 of the Constitution of Kenya. However, despite these gains, there are still some vestiges of colonial and post-colonial legislations that remain in our statute Books. The first is the Stock and Produce Theft Act, which is a colonial legacy that is still in force today having come into operation on 5th May 1933. The second is the Indemnity Act which was enacted in 1970 during the emergency period and yet is still part of the Laws in spite of the repeal of the other emergency Laws. Moreover, in the year 2001, the Safina Member of Parliament from Wajir West Constituency, Hon. Adan Keinan, brought a motion in

Parliament to repeal the Indemnity Act, which Motion was passed by the Parliament. However, to date no bill has come to the house to repeal the said Act to implement the resolution of the house.

With the repeal of the emergency Laws and the advent of Multi-Party Politics in Kenya, the people of N.E.P and N.F.D now appear to enjoy relative protection of their fundamental rights. The people are much freer than before and they are slowly becoming aware and assertive of their rights. Despite the many hardships in the area, the people have somehow managed to rise up to the challenges facing them in their endeavor to re-integrate with the larger Kenyan Society. While there is a lot to be done for the region and the people in terms of development in all aspects of life, there is no denying that the people of the region have found their way into the socio-economic and political systems of the country through sheer hard work, determination, will power and commitment in what they do. They have made impressive progress in making themselves strong actors in trade and business in Kenya, and in every other aspect of Kenyan Society. Their potentials and morale was not destroyed by the colonial and post-colonial emergency legal regime applied to them. They have refused to regard or see themselves as inferior or second class citizens and proved right, Lady Eleanor Rooservalt's statement that, "**no one can make you feel inferior except with your own consent**".

LEGAL AND ADMINISTRATIVE IMPEDIMENTS TO DEVELOPMENT OF NORTHERN KENYA.

1. The creation of the Ministry of state for the Development of Northern Kenya and other Arid Lands by the Coalition Government is an important milestone in addressing the problems of the said regions. This Ministry can become the focal point for the government's efforts in addressing the historical injustices, marginalization and underdevelopment that had defined the region.

The Ministry was created by executive fiat. If it is to be effective and not just symbolic and cosmetic, there must be a legal framework upon which the Ministry can be built. The Law must set out the functions of the Ministry, the Powers of the Minister, and the procedures for the implementation of its functions. Such a Law will also establish the

necessary Institutions or parastatal bodies that will become the vehicle for the implementation of the policies and programs of the Ministry. For example the Arid Land and Resource Management Project can be converted into such an institution under this Ministry.

The Law must also harmonize the work of this Ministry and those of other Ministries. There is need to set clear guidelines to what is exclusive and what can be concurrent and to avoid overlaps.

2. In spite of the repeal of the Emergency Laws, there are still some vestiges of some Laws and administrative practices that have remained to date. This includes but is not limited to the following :- (a) The Stock Theft and Produce Act which provides for the collective punishment of the Pastoralist Communities of Northern Kenya is still part of our Laws. So too is the Indemnity Act, which was meant to immunize the security forces against any claims for their conduct, but which law is now spent. These two Acts of Parliament should be repealed to formally bury and lay to rest the Emergency Law regime.

(b) The Security forces still operate under the emergency Law era mentality. There are so many unnecessary barriers mounted by the Police and the Administration Police in the name of security but which have become sites for harassment of people, corruption and the hindrance of the free movement of people and goods in the region.

The Police force is still to change its mindset in the region. It is common knowledge when Police recruits from Kiganjo are posted to North Eastern Province, they are given more training at the Forces Training Centre in Garissa before deployment. While all Police Officers are required by Law to wear their uniform and display their force numbers, the Police Officers in Northern Kenya do not do so. This even includes the Traffic Officers. They wear their uniform without displaying their force number and are mostly dressed in jungle fatigues. The anonymity granted to them by this mode of dressing aids and abets the culture of impunity within the force. This practice must be reversed and the security forces operating in Northern Kenya must do their work under

the same conditions as their colleagues in other parts of the country.

3. The Absence of a legal mechanism for restorative Justice for those affected by the Emergency Laws in the region is one deficiency that requires to be addressed. The people affected by the gross violations of human rights during the Emergency law period, such as the victims, widows and orphans of the Wagalla massacre, need closure to what happened to them. There has not even been a Commission of Inquiry to inquire into the excesses of the security forces in the region.

4. The lack of a legal framework for affirmative action and positive discrimination to assist the people of the region recover from the past historical injustices still remains an impediment to the region to catch up with other parts of Kenya. Even though it is quite obvious that the region lags behind in education which has seriously affected the number of students joining the public universities, there is no effort at affirmative action in giving quotas to the region to enable its students get admission to the public universities.

5. The lack of Lands Registries in the region is one of the major impediments to the economic progress of the people of the region. Under the Registered Land Act, Chapter 300, Laws of Kenya, there are established Land Registries in every district to empower the District Lands Register to issue title deeds for properties in that District. Once Land has been allocated, surveyed and letter of allotment issued, every allottee is required to meet the conditions on the letter of allotment to be able to get a title deed.

Title to land or property is the legal proof of ownership. This enables the owner to offer such title as security to access financial loans, guarantee payment of goods and services, give surety for bail or bond in Court etc.,

The entire Northern Kenya does not have a single Lands Registry where a title can be processed, or sales, transfers and charges can be registered. In the first place, most of the properties in the urban centers in the region have not been properly surveyed and very few people have titles to their lands. Even then, those few with title to their properties have to travel all the way to Nairobi to transact any business on their land.

This is because the Registry Index Map (R.I.M) for Northern Kenya, which captures the properties that have been surveyed and registered, is held in Nairobi.

It is therefore imperative that the system of land registration be effected in the region and land registries be established in every district headquarters. If a person can sell and transfer his lands with a title in Kajiado without coming to Nairobi, there is no reason why another person from Moyale, Ijara or Mandera is forced to come to Nairobi to do such mundane things as pay land rent or apply for official search.

6. The Districts and Provinces Act, No. 5 of 1992 establishes the composition of the provinces in Kenya among others. Moyale, Marsabit and Isiolo, which were initially part of the Northern frontier districts, have been put under Eastern Province whose headquarters is in Embu. This means that all provincial heads of department of various Government institutions are based in Embu. It is therefore quite punishing and costly for a resident of Moyale to come to Embu to receive any service from a provincial head of department. It would be more realistic and justifiable if the upper Eastern, as Moyale, Marsabit and Isiolo is commonly called, were to be formed into one province in the spirit of bringing government services closer to the people.

7. Under the Judicature Act, Chapter 8, Laws of Kenya, the Chief Justice is empowered to create High Courts and Magistrate's Court in any part of the country. For the people of Northern Kenya, access to justice is a nightmare. There is no High Court in the whole region. Appeals from the Magistrate's Courts must be filed in the High Court either in Nairobi, Embu or Meru. This is quite prohibitive and discouraging and most dissatisfied people choose not to appeal. The Magistrates Courts are also quite few and not able to satisfy the needs of the people. So too are the Kadhi's Courts which attend to matters of personal Law for those of the Muslim faith.

8. The tourism potential of the region has never been harnessed and has in fact been neglected by the policy makers in the tourism industry. The Kenya Tourism Development Corporation, the Kenya Tourism Board and the Tourism Trust fund (which is a fund set up by the Government of Kenya in collaboration with European Union) are the premier institutions to promote tourism in Kenya. There have been efforts at opening

up more tourist circuits in the Rift Valley, Western Kenya and Nyanza Provinces but there appears to be no plans for opening up one such tourism circuit in Northern Kenya. Instead of taking the camel to the tourists at the Coast, there should be more efforts put to take such tourists to the camel in its natural habitat and to explore other potential tourist attractions in the region.

9. The Kenya Wildlife Services is also mandated to manage our National Parks, Game Reserves and protect the Wildlife, Flora and fauna of the county. The few Game Parks and Reserves in Northern Kenya, such as the Kora, Arawale and others have been neglected by the Kenya Wildlife Services. If these Game Parks and Natural Reserves were well managed they could be an important tourist attraction for they have many species of wild animals, some of them quite rare, and this could have benefited the people and the region. Instead, the Kenya Wildlife Services has, in some instances, been accused of poaching rare species of wild animals, such as the “**hirola**” antelope which is an endangered species under CITES, from these game parks and translocating them to other National parks.

In 1995, the Kenya Wildlife Services translocated 68 “**hirola**” antelope from Garissa to the Amboseli National Park. It was only stopped from translocating more “**hirolas**” when the residents of Garissa and Ijara filed a case in the High Court and obtained an injunction restraining the Kenya Wildlife Services from the translocation.

10. Livestock is the major economic mainstay of the region. If this sector was properly managed, it could bring enormous benefit to the people and the region. The absence of legal framework for the marketing and sale of livestock and livestock products from the region is a major obstacle to the development of the region. There is need to establish institutions to support this sector such as marketing boards, abattoirs, cold storage, slaughter houses and airports of international standards for the export of these products. The Kenya Meat Commission should have been located in the region or at the very least have an effective branch there.

11. The problems encountered by the people of Northern Kenya in obtaining Birth Certificates, Identity Cards and Passports is well known and is a matter of Public

notoriety. The Registration of person's office and the immigration department have made it very difficult for young persons from the region to obtain these important documents to enable them register as voters and take part in the National Political affairs of the country or to travel out of the county to study or seek for other opportunities abroad.

12. The role played by the civil society and charitable institutions in supplementing Government efforts in the alleviation of poverty cannot be ignored. However, a more rigid and strict application of the NGO Co-Ordination Act and the Societies Act, makes it difficult for local professionals from the region to register local NGOs and Charitable organizations. They are left to work for international NGOs working in the area either as employees or as implementers of their programs through community based organizations (CBOS) that are registered under the Ministry of Culture and Social Services.

13. Due to poor infrastructure of the region and lack of other services essential to private sector engagement, there is total absence of any industries or manufacturing concerns. With the relative peace in the region and the availability of raw materials and cheap labor, there is an urgent need to enact legislation that is geared towards encouraging private investment in industry and the manufacturing sector. Such a law should contain provisions for tax incentives in the manner of the EPZ to spur the economic growth of the region and wealth creation.

CONCLUSION

The legal and administrative impediments to the development of Northern Kenya can be overcome through the enactment of appropriate legislation, where necessary, and administrative action by the relevant Ministry or Government department concerned. This can only be achieved successfully if there is political goodwill from the executive and a parliament that is accommodating

REFERENCES

1. The Constitution of Kenya.
2. Northern Kenya and the Constitutional Review Process – Lessons from History “By Ahmed Issack Hassan, 2002”.
3. Administration of Criminal Justice in Hardship and Marginalized areas by Abdikadir Haji Hussein - September 1998.
4. Ogaden Somalis - A case study of self-determination by Ahmed Nasir M. Abdullahim, 1990.
5. Modern Somali History by Prof. I.M. Lewis - Pg. 184.
6. The Somali Dispute by Drysdale J in the Shenval Press, Pg.32.
7. The outlying Districts Act, Chapter 104, Laws of Kenya (now repealed).
8. The Special Districts (Administration) Act, Chapter 105, Laws of Kenya (now repealed).
9. The Stock and Produce Theft Act, Chapter 355, Laws of Kenya.
10. Kenyan Somalis - A Case of Institutionalized discrimination by Hon. Farah Maalim, 1994.
11. Northern Frontier District Commission Report, 1962.
12. Details of Kenya Constitutional Conference, 1962 - special issue - of 28/6/1962.
13. The checkered history of the Somali in Kenya by Mohamed K. Ibrahim in Wajibu, Vol. 7 No.3 (1992).
14. Amendments to the Independence Constitution by Dr. Githu Muigai.
15. The Politics of Constitutional change in Kenya since Independence:-1963-1969 by Prof.H.W.O. Okoth Ogendo, Pg. 27.

16. Fundamental Human Rights and Freedoms in Kenya: An assessment and implications on the Pastoralist Communities of Northern Kenya by Hassan Nunow Lakicha.
17. The Indemnity Act, Chapter 44, Laws of Kenya.
18. Africa Watch, Kenya - Taking Liberties (1991) Pg. 272.
19. Africa Watch (1991).
20. Massacres that won't stop, Society Magazine, 17th January 1994, Pg.11.
21. The Penal Code, Chapter 63, Laws of Kenya.
22. The Preservation of Public Security Act, Chapter 57, Laws of Kenya.
23. Registration of Persons Act, Chapter 107, Laws of Kenya.
24. The Immigration Act, Chapter 172, Laws of Kenya.
25. The Registered Land Act, Chapter 300, Laws of Kenya.
26. The Trust Land Act, Chapter 288, Laws of Kenya.
27. The Police Act, Chapter 84, Laws of Kenya.
28. Districts and Provinces Act, No. 5 of 1992.

END